

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 21

McGRAW-HILL BROADCASTING COMPANY, INC.,  
d/b/a KGTV<sup>1</sup>

Employer

and

Case 21-RC-20867

NATIONAL ASSOCIATION OF BROADCAST  
EMPLOYEES AND TECHNICIANS-COMMUNICATIONS  
WORKERS OF AMERICA, AFL-CIO

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record<sup>2</sup> in this proceeding, the undersigned makes the following findings and conclusions.<sup>3</sup>

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<sup>1</sup> The Employer's name appears as amended at the hearing.

<sup>2</sup> The Employer and Petitioner timely filed briefs, which were duly considered.

<sup>3</sup> The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organization involved claims to represent certain employees of the Employer and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

## **I. SUMMARY**

The **Employer**, McGraw-Hill Broadcasting Company, Inc., d/b/a KGTV, is a New York corporation engaged in the operation of a television broadcasting station located at 4600 Air Way San Diego, California.

The **Petitioner**, National Association of Broadcast Employees and Technicians-Communications Workers of America, AFL-CIO, seeks to represent the following unit, herein called the petitioned-for unit:<sup>4</sup>

All full-time and regular part-time news department employees, including editors, photographers, news producers, sports producers, investigative producers/special project producers, and writers employed by the Employer in and out of its facility located at 4600 Air Way, San Diego, California; excluding all other employees, office-clerical employees, guards and supervisors as defined in the Act.

The Employer contends the news producers and sports producers must be excluded from the petitioned-for unit because they are supervisors within the meaning of Section 2(11) of the Act. Petitioner contends they are not statutory supervisors.<sup>5</sup>

I have considered the record evidence and arguments presented by the parties. For the reasons set forth in detail below, I have concluded that the news producers and sports producers are not statutory supervisors and should be included in the unit. Accordingly, I shall direct that an election be held in the petitioned-for unit.<sup>6</sup>

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<sup>4</sup> The petitioned-for unit appears as amended at the hearing.

<sup>5</sup> The parties stipulated that the editors, photographers, investigative producers/special project producers, and writers are properly included in the petitioned-for unit.

<sup>6</sup> The record reveals that that there are 35 employees in the petitioned-for unit: 5 editors, 16 photographers, 10 news producers, 1 sports producer, 1 investigative producer/special projects producer, and 2 writers.

Below I have set forth the record evidence concerning the Employer's operations and the alleged indicia of supervisory status. Thereafter, I have set forth a section applying the Board's legal standards to the evidence. The decision concludes with a direction of election and the procedures for requesting review of this decision.

## **II. RECORD EVIDENCE**

### **A. The Employer's Operations**

The Employer, an affiliate of ABC, operates a television broadcasting station in San Diego, California. The Employer's operation includes a news department, which is responsible for preparing and broadcasting daily news programming.

The record reveals that news broadcasts air in this regard at the following times:<sup>7</sup>

Weekdays: 5:00 a.m.; 6:00 a.m.; 11:00 a.m.; 5:00 p.m.; 5:30 p.m.  
6:30 p.m.; and 11:00 p.m.

Weekends: 9:00 a.m.; 5:00 p.m.; 6:30 p.m.; and 11:00 p.m.

Michael Stutz, news director is the head of the news department. Below him are Sean Kennedy, assistant news director, and J.W. August, managing editor.

The Employer does not maintain any kind of formal or written organizational chart, but the above individuals are undisputedly held out to the news department staff as being managerial/supervisory personnel.<sup>8</sup>

The record reveals that in addition to the classifications being sought in the petitioned-for unit (editors, photographers, news producers, sports producers, investigative producer/special projects produces, and writers), the following additional

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<sup>7</sup> The precise start/end time for each broadcast was not specifically testified too.

<sup>8</sup> Stutz, Kennedy, and August (along with an administrative assistant) each have their own office at the Employer's facility. The remainder of the news department staff work in an open room, estimated to be a little bigger than 35 x 70 feet.

classifications of people work in the news department: assignment editors;<sup>9</sup> the on-air personnel (e.g., reporters, anchors); and the staff who work during the live broadcasts (e.g., director, camera operators).

For each live news broadcast, the Employer assigns a specific producer to produce the broadcast. For example, News Producer Doris Lewis is assigned to the 6:30 p.m. weekday broadcast. Thus, she produces that broadcast on a full-time basis.<sup>10</sup>

In addition to the producing duties discussed below, the record reveals that some producers perform some writing work. In this regard, some producers will write pieces for the broadcast they are producing, or may write for another producer's broadcast if that producer needs help. In addition, the Employer assigns some producers to do exclusively writing work on days the producer is not producing a news broadcast.

## **B. The Alleged Indicia of Supervisory Status**

The sole issue in this case is the alleged supervisory status of the news and sports producers.<sup>11</sup> At hearing, the Employer called, as its only witness, Michael Stutz, news director. The Petitioner called, as its only witness, Doris Lewis, a news producer. No documents or exhibits were introduced by either party. The relevant record testimony regarding supervisory indicia is set forth below.

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<sup>9</sup> Petitioner initially sought inclusion of the assignment editors (also referred to as assignment desk personnel) in the petitioned-for unit. The Employer objected, contending the assignment editors are statutory supervisors. At the conclusion of the hearing, Petitioner amended the petitioned-for unit to remove the assignment editors from inclusion. The parties did not, however, enter into a stipulation regarding the supervisory status of the assignment editors.

<sup>10</sup> However, the record reveals that producers fill in for one another if someone is sick, or on vacation, etc. It also appears from the record that producers fill in for one another in this regard without complication.

<sup>11</sup> At the beginning of the hearing, the parties represented that evidence introduced regarding the duties and responsibilities of a *news producer* should also be considered as evidence of the duties and responsibilities of a *sports producer*. Therefore, and unless otherwise noted, the use of the term "producer" or "news producer" in the remainder of this decision shall apply to both classifications.

1. The authority to assign and responsibly direct

The Employer contends that producers assign and responsibly direct the Writers and reporters by their daily activities. More specifically, the Employer cites to the producers involvement in: (a) editorial meetings; (b) preparing the rundown; (c) making work assignments; (d) directing writers/reporters during the day; and (e) directing the broadcast.

The Employer further contends that producers direct the workforce during times the managers are not at the facility (mornings, nights, and weekends); and finally that producers are held accountable for failing to supervise reporters and writers.

The record evidence in support of these assertions is as follows:

(a) Editorial Meetings

The news department conducts morning editorial meetings weekdays at 8:30 a.m. The meeting is attended by News Director Stutz, Assistant News Director Kennedy, Managing Editor August, the producers assigned to the 5:00 p.m., 5:30 p.m., and 6:30 p.m. news broadcasts, assignment editors, reporters, and photographers.

At the start of the meeting, an assignment editor<sup>12</sup> will identify the potential news stories that can be covered that day. The meeting is then opened up for discussion regarding which of these stories<sup>13</sup> should be selected to air on the 5:00 p.m., 5:30 p.m., and 6:30 p.m. news broadcasts; and which reporters should be assigned to cover the stories.

According to News Director Stutz, the producers will request at the meeting the stories they think should be selected for their newscasts. He further stated that the others

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<sup>12</sup> The assignment editors, among other duties, are responsible for gathering potential news stories.

<sup>13</sup> A typical half-hour news segment has 20 stories.

in attendance including reporters give their opinions about which stories should be selected. Stutz contended a discussion ensues until an agreement is reached. He further testified that if agreement on the stories can not be reached, he will ultimately decide which stories to go with.<sup>14</sup>

Producer Lewis attends the morning editorial meeting. As previously stated, she is the producer for the 6:30 p.m. news broadcast. According to her testimony, everyone attending the meeting gives input and the stories are selected based on the collective input.<sup>15</sup>

(b) Preparing the *rundown*

After the editorial meeting, the producers creates a *rundown* for their specific broadcast. The record reveals that a rundown will identify the stories that are going to air during the producer's assigned newscast; the order those stories will go in; how long each story will be; and the writer and reporter assigned to the story.

In structuring the rundown, the producer must stay within certain format guidelines. In this regard, there must always be certain regularly scheduled features (e.g., weather, sports, etc.) and these features must go in a specific order. The producer does not have the discretion to remove a feature, or to change the order of the features.

Once prepared, the rundown is given to the director and is used as an outline for the broadcast. For example, the director uses the rundown as a guide in determining which camera angles will be utilized in filming the newscast.

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<sup>14</sup> It is unclear from Stutz' testimony what constitutes an "agreement."

<sup>15</sup> Regarding the selection of stories for other news broadcasts, the record reveals that editorial meetings are conducted on weekday afternoons (for planning the 11:00 p.m. news broadcast), and on Friday afternoons (for planning the weekend newscasts). The record reveals that these meetings are similar in procedure and form as the morning meetings.

A producer's rundown can be changed by the news director or assistant news director. The record also reveals that if a reporter wanted to make a change to a producer's proposed rundown, the reporter can go to the news director and request the change.

(c) Making work assignments

The record reveals that the majority of the reporter assignments are made at the editorial meetings and these assignments (like the stories selected) are made after input from everyone is discussed. If there is a disagreement during that meeting about an assignment, the news director will make the ultimate decision.

According to News Director Stutz, if an assignment needs to be made after the editorial meeting has taken place (i.e. breaking news), the relevant producer, in consultation or coordination with an assignment editor,<sup>16</sup> has the discretion to make the reporter assignment. If an assignment editor and producer disagree about a proposed assignment or reassignment of duties, the dispute will be referred to the news director or assistant news director to decide.

Producer Lewis testified that after the editorial meeting, if a reporter assignment needs to be made, she has the discretion to assign or reassign a reporter to a particular story.<sup>17</sup>

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<sup>16</sup> Stutz testified that the assignment editors are in charge of crew assignments - matching up reporters and photographers for assignments. It is unclear from record the precise role the assignment editors play, or if coordination/consultation with an assignment editor is always required before the producer makes an assignment.

<sup>17</sup> Specific concrete examples of the making of such an assignment, and circumstances therein, was not further elaborated on.

Regarding assignments to writers, and regarding the weekday news broadcasts,<sup>18</sup> there are two writers available (per shift) to a producer.<sup>19</sup> The producer gives writing assignments to these writers after the editorial meeting.

The producer assigns each writer to work on a particular news story, or stories, for that producer's broadcast. Thus, the producer decides which of the two writers will work on which stories.

News Director Stutz testified that these writing assignment decisions are based on which writer the producer thinks is more capable to write a particular piece(s).<sup>20</sup> He acknowledged that the workload of the writers at any given time may play a part in the assignment decision.

According to Producer Lewis, her writing assignment decisions are primarily based on which of the two writers is more familiar with the news story. In this regard, and as an example, if one of the two writers wrote a piece on the same subject for an earlier news broadcast, she will assign the same writer to write a piece on the same subject for her broadcast.

(d) The direction of reporters and writers during the day

The record reveals that producers may check in with reporters in the field during the day regarding the progress of a story.<sup>21</sup> During these contacts, and if not

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<sup>18</sup> For weekends, the record suggests that only one writer is available.

<sup>19</sup> The record reveals that a writer's job duties are to write stories and to review videotape to select sound bytes for stories.

<sup>20</sup> Stutz did not provide specific detailed examples regarding what "capability" issues exist or differentiate the writers.

<sup>21</sup> The record is unclear regarding how often producers check in with reporters in this regard.



already decided at the editorial meeting, the producer may tell the reporter how the producer thinks a particular piece should be done (i.e. live-shot, or recorded).<sup>22</sup>

As for investigating and reporting the story itself, the record reveals that great deference is given to the reporters. News Director Stutz testified that he hires seasoned reporters and they are given latitude and independence to go out in the field and gather/report the story as the reporter sees fit.

The record reveals that producers may check up on writers during the day regarding the status of assigned stories (i.e. to see if it is done). In addition, the record reveals that producers will proof-read some, but not all, of the written stories before the pieces goes to air.<sup>23</sup>

(e) Directing the broadcast

The record reveals that producers are present during the airing of their assigned news broadcast, primarily to make sure things run smoothly. For example, if the newscast is running longer then it should, the producer will decide where in the remaining news pieces to cut time. In addition, a producer may communicate to an anchor through an ear-piece to wrap something up and move on.

The record reveals that under certain circumstances, if there is a breaking news story during a broadcast, a producer has the discretion to prepare and insert a story on that breaking news into the producer's broadcast.

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<sup>22</sup> The record reveals that if a reporter disagrees with how a producer asks a story to be done, the reporter can contact the News Director. Specific, detailed testimony regarding these types of consultations was not presented.

<sup>23</sup> The record reveals that the stories written for air (also called scripts) can be altered by a producer, the managing editor, assistant news director, or an anchor after the writer has submitted the piece.

(e) Early mornings, evenings, and weekends

The record reveals that the news director, assistant news director, and managing editor are not generally present at the station during the early morning or late night weekday broadcasts, or on weekends.

According to News Director Stutz, the producers for the segments that run during these time periods, and the assignment editors on duty, are the highest ranking people at the station during those times.

News Director Stutz and Assistant News Director Kennedy both have company issued cellular phones. The record reveals that the news department staff may call them at any time on these phones if a problem or question comes up.

The record also reveals that the Employer has a "manager-on-call" for the weekends. The manager-on-call is a rotational duty, rotated between: News Director Stutz, Assistant News Director Kennedy, Managing Editor August, or one of the assignment editors. The manager-on-call is responsible for calling into the station, throughout the weekend, to go over rundowns, or discuss any issues.

(f) Accountability for performance by writers and reporters

Stutz is not aware of any past example in which a producer was specifically disciplined for failing to "supervise" a writer or reporter. But, he testified that there have been times when he has had discussions with producers about their failure to supervise. He did not, however, recall the specifics of those instances.

The record reveals that if a writer makes a factual mistake in writing a piece, and the producer did not proof-read the piece before it aired,<sup>24</sup> the producer is not held responsible for the writer's mistake. If a reporter makes a mistake during a live-shot (i.e. says the wrong name), the producer is also not held accountable.

## 2. The authority to discipline

The Employer contends that producers have the authority to discipline reporters and writers. In this regard, Stutz testified that he has a system set up whereby he encourages the producers to meet one-one-one with writers or reporters to point out any performance related deficiencies the producer may have observed.<sup>25</sup> If a performance problem becomes persistent, the producer can come to him or the assistant news director and they will then address it with the individual.<sup>26</sup>

Stutz also testified that he similarly encourages reporters to do the same thing with producers, i.e. to approach a producer the reporter has an issue with. If the problem becomes persistent, the reporter can go to Stutz about it.

Producer Lewis testified that she has met with writers and pointed out deficiencies she has observed.<sup>27</sup> If the deficiency continues to be a problem, or if she is not comfortable approaching the writer about the problem, she will go to the news director or assistant news director and tell them about it, but she does not make a recommendation regarding what course of action they should take against the writer.

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<sup>24</sup> It is unclear from the record what, if any, discipline a producer would receive if a producer did proof-read a piece before it aired.

<sup>25</sup> News Director Stutz testified, generally, that during a one-on-one meeting, the producer, may inform the employee that if corrective action is not taken, the employee may receive formal discipline.

<sup>26</sup> The concept of these "one-on-one" meetings was only generally testified about. Stutz did not testify to specific concrete past examples.

<sup>27</sup> It is unclear from the record if this is done of her own volition, or if the Employer has instructed her to do this.

3. The authority to set work hours

The Employer contends that producers control work hours because they can call people in to work, send people home, and authorize overtime.

The record reveals that producers do not set the work schedules for writers, reporters, or any other news department staff member.

News Director Stutz testified that producers can, however, call employees to come in to work if additional employees are needed. He further testified that producers can send employees (e.g. if they are sick) home early. He testified that this does not come up regularly and this authority can not be abused by a producer.<sup>28</sup> Stutz testified that producers do not need to check with him before making these decisions, but that many times they do.

Stutz testified that producers can also authorize an employee to work overtime. He testified that this has not happened very often in the past. He also testified that producers have come to him to ask if an employee can be allowed to work overtime, but that producers do not have to do this. He also stated that if an employee refuses a producer's request to work overtime, the producer can not discipline the employee for refusing the request.

Producer Lewis testified that she does not have authority to authorize overtime. In the past, she has had to specifically request permission from the assistant news director or news director for overtime to be authorized.

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<sup>28</sup> There is no specific evidence regarding guidelines or standards. In addition, Stutz did not provide specific concrete examples of past occurrences of this alleged authority.

4. The authority to effectively recommend

The Employer contends that producers make effective recommendations with respect to personnel decisions about: (a) hiring; (b) firing; (c) discipline; and (d) evaluations.

(a) Hiring

Stutz testified that hiring decisions ultimately rest with him. He also testified that producers do not participate in the *direct* hiring of news department staff. However, and before making a hiring decision (for a writer or reporter), Stutz testified that he seeks out and relies heavily on input from producers about the applicant.

In this regard, he will have the applicant meet with the producer(s) that the applicant will be working with if hired.<sup>29</sup> Later, and before making the hiring decision, Stutz will ask the producer(s) what he/she thought of the applicant.<sup>30</sup>

Stutz testified that he values, and factors into his hiring decision, the input that is given to him by the producer(s); and that he would not generally hire a reporter or writer without getting producer feedback first.<sup>31</sup>

As one of two examples regarding a producer's participation in the hiring process, Stutz testified that he recently hired a temporary employee (Ramone Galindo) for a permanent position. He testified that at a time prior to making Galindo permanent (the time period is unclear from the record), a producer (unidentified in the record) told

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<sup>29</sup> Similarly, Stutz testified that if he is considering making a part-time employee full-time, or making a temporary employee permanent, he will seek out input from a producer that works with the employee. Furthermore, and regarding reporters (who enter into personal service contracts with the Employer), Stutz testified that if a reporter's personal service contract is about to expire and he is considering renewing the contract, he will seek out input from a producer that works with the reporter.

<sup>30</sup> The record reveals that Stutz has applicants similarly meet with other classifications of employees (e.g. he may introduce an applicant for a reporter position to a current reporter).

<sup>31</sup> Stutz testified that he relies more heavily on producer input for hiring decisions regarding writers than reporters.

Stutz that Galindo would be a good candidate for the full-time position. He testified, generally, that this input factored into his decision.

As the other example, Stutz testified that a producer (unidentified in the record) recently told him that he/she (the producer) hoped Stutz was not considering making a current freelance reporter (unidentified in the record) full-time. Stutz testified that although there is no full-time position currently available, if one becomes available, this freelance reporter probably won't be considered based on this producer's comment.

Producer Lewis (who has been employed since 2000) only recalls one occasion in which she was specifically asked to give her opinion about an applicant. On that one occasion, and while she was in Stutz' office, he asked her opinion about an applicant (reporter) who Stutz was watching on a video tape at the time.<sup>32</sup>

Regarding writers, producer Lewis testified that the Employer has asked her if she knew of a particular applicant under circumstances in which the applicant currently worked at a station that Lewis previously worked for. However, Lewis did not know of the applicants in those instances and so told the Employer.

Lewis testified that on a few past occasions, the Employer has introduced her to applicants for writing or producing positions. In her conversations with these applicants, she told them about herself and her experiences with the Employer. The applicants told Lewis about themselves as well. She did not specifically question or

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<sup>32</sup> It is unclear from the record if she was called into his office specifically to view the tape, or if she just happened to be in the office while the tape was on. No specific details regarding what she subsequently told Stutz, or what weight the Employer gave that opinion.

interview the applicants. Later, the Employer came back to Lewis and asked what she thought about the applicant.<sup>33</sup>

(b) Termination

News Director Stutz testified that although the ultimate decision to terminate rests with him, he will seek out, and factor in, input from producers about the individual in question before making the decision.

As his example, Stutz testified, generally, that about 2 or 3 years ago, a producer (unidentified in the record) brought to his attention a performance problem (the problem is not specified in the record) of a staff member (name and job classification is not identified in the record). Stutz discussed the issue with the person, but the problem persisted. Stutz testified that eventually the staff member was terminated. Stutz testified that the producer's input about that person had been important to him in making the decision.

(c) Discipline

As discussed above, Stutz testified that producers come to him to report performance problems about writers or reporters. He testified that producers will ask him to talk to the person involved. Stutz testified that either he or the assistant news director will, in those circumstances, then go and discuss the issue with the individual.

Also as discussed above, Producer Lewis testified that she has complained to Stutz about the poor performance of certain writers, but does not make a recommendation regarding discipline.

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<sup>33</sup> Lewis also testified that the Employer has sought out her opinion about current employees (presumably writers) that were being considered for producer positions. In this regard, the Employer has asked her if she thinks the employee is ready to produce and she has given an opinion about that.

(d) Evaluations

The record reveals that the news department staff, except for reporters who are subject to personal service contracts, are given annual written evaluations. The evaluations are prepared by Assistant News Director Kennedy. He meets with the staff members individually<sup>34</sup> and gives them the written evaluation. He signs the evaluation in a spot designated as being reserved for a supervisor.<sup>35</sup>

News Director Stutz testified that he encourages the assistant news director to seek input from the producers prior to giving writers their annual performance reviews. He does not, however, instruct Kennedy what weight to give any such opinion.<sup>36</sup> Stutz testified that feedback (from producers) given throughout the year about a writer may also be factored in by Kennedy when preparing a writer's evaluation.<sup>37</sup>

Producer Lewis testified that she has never been formally asked to give a recommendation regarding the work performance of a current employee for purposes of an upcoming evaluation, but that she has occasionally been asked about the performance of some writers.<sup>38</sup>

5. Producers head sweeps teams; attend strategic planning meetings

The Employer contends that producers head up committees (called "sweeps teams") and attend strategic planning meetings with consultants, which thereby constitutes evidence of supervisory status indicia.

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<sup>34</sup> The producers do not sit in on the evaluation meeting.

<sup>35</sup> Neither party introduced a sample evaluation. Thus, it is unclear from the record precisely what is stated on the evaluation.

<sup>36</sup> Stutz testified, however, that the input is a "part, if not major factor" of the evaluation process.

<sup>37</sup> The Assistant News Director did not testify at the hearing.

<sup>38</sup> Lewis also testified that she has gone to management and told them if someone is performing well. It is unclear from the record if she has been instructed to do this, or if she does this of her own volition.



The record reveals that some producers head up what are referred to as "sweeps teams." The Employer created and started these teams in November 2005. The purpose of the teams is to meet during sweeps periods (November, February, and May of each year) to ensure everything is set to go smoothly on the news broadcasts airing during that time period. Other people that participate on these teams are reporters and anchors. Further specific details regarding the participation of each member on these committees were not revealed.

The record also reveals that the Employer hires consultants to do research and the consultants meet with, and provide feedback to, management, assignment editors, producers, and on-air personnel. The consultants provide suggestions on improving the newscasts. Further specific details regarding these meetings were not provided.

### **III. ANALYSIS**

#### **A. General legal standards**

##### **1. Section 2(11)**

Section 2(11) of the Act defines "supervisor" as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be read in the disjunctive, and "the possession of any one of the authorities listed in [that section] places the employee invested with this authority in the supervisory class." Ohio Power Co. v. NLRB, 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949).

The exercise of “some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner,” or through giving “some instructions or minor orders to other employees,” does not confer supervisory status. Chicago Metallic, 273 NLRB 1677, 1689 (1985).

2. The burden of proof

The burden of proving that an employee is a statutory supervisor is on the party alleging such status. NLRB v. Kentucky River Community Care, 532 U.S. 706, 711-712 (2001). Any lack of evidence in the record is construed against the party asserting supervisory status. Elmhurst Extended Care Facilities, 329 NLRB 535, fn. 8 (1999). Mere inferences or conclusionary statements without supporting evidence are insufficient to establish supervisory authority. Volair Contractors, Inc., 341 NLRB No. 98, slip opinion at page 3 (2004).

The Board has further held that whenever evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established. Phelps Medical Center, 295 NLRB 486, 490-91 (1989).

**B. The Employer has failed to meet its burden in establishing that the producers are supervisors within the meaning of the Act**

1. The alleged authority to assign and responsibly direct

The Employer argues that the producers assign and responsibly direct writers and reporters. In support, the Employer cites to the producers’ participation in editorial meetings, preparing rundowns, making work assignments, directing reporters/writers during the day, and directing the broadcast. In addition, the Employer

argues that producers are in charge when management is not present, and are also held accountable if they failure to properly supervise.

Under Board law, proof of independent judgment in the assignment or direction of employees entails the submission of **concrete evidence** showing how assignment decisions are made. Harborside Healthcare, Inc., 330 NLRB 1334, 1336 (2000); Crittenton Hospital, 328 NLRB 879 (1999).

The assignment of tasks in accordance with an employer's set practice, pattern or parameters, or based on routine or obvious factors, does not require a sufficient exercise of independent judgment to satisfy the statutory definition. See Express Messenger Systems, 301 NLRB 651, 654 (1991). Similarly, the degree of independent judgment required to direct employees in the performance of routine, repetitive tasks is correspondingly reduced. Ten Broeck Commons, 320 NLRB 806, 811 (1996).

Furthermore, whether direction is "responsible" as required by Section 2(11) depends "on whether the alleged supervisor is held fully accountable and responsible for the performance and work product of the employees he directs." Schnurmacher Nursing Home v. NLRB, 214 F.3d 260, 267 (2<sup>nd</sup> Cir. 2000). Such accountability and responsibility can be established through evidence of disciplinary warnings and evaluations specifically holding supervisors accountable for their failure to direct and delegate work to subordinates. *Id.*

In King Broadcasting Co., d/b/a KGW-TV, 329 NLRB 378 (1996), the Board, found that news producers "were not statutory supervisors where they were part of an integrated production team in which their skills and responsibilities were joined in a collaborative effort with those of other news department employees in order to coordinate

and develop a single product." In so doing, the Board further held that members of the production team were independently capable of executing their own assignments and thus, the disputed producers did not responsibly direct other in the performance of their duties. *Id.* at 381.<sup>39</sup>

Based on the above law and record evidence, I find that the Employer has not met its burden in establishing that the producers assign and responsibly direct the writers and reporters within the meaning of Section 2(11) of the Act. Rather, I find that the news producers are part of an integrated production team in which their skills and responsibilities are joined in a collaborative effort with other news department staff in order to coordinate and develop a single product.

(a) Editorial Meetings

The record reveals that the editorial meetings are a collaborative process and the decisions made therein (story selection / reporter assignments) are made after the input and opinions of everyone attending are heard and discussed. The record does not reveal that a producer's opinion is final, or carries any greater weight than other opinion. To the contrary, and if there is a disagreement, it is the news director that ultimately decides.

(b) Preparing the rundown

Regarding a producer's preparation of the rundown, the record reveals that the rundown is predominately controlled by the decisions made at the editorial meetings.

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<sup>39</sup> In finding that the news producers were not supervisors in King Broadcasting, the Board relied, *in part*, on their "exercise of substantial judgment . . . based on their own training, experience, and expertise." *Id.* at 382-383. In Kentucky River, the Supreme Court rejected the Board's position that independent judgment does not include the exercise of professional or technical judgment. Kentucky River, *supra*, 532 U.S. at 713-714. My reliance on King Broadcasting, however, does not rest on this rejected interpretation of independent judgment. Thus, arguments in the Employer's post-hearing brief regarding the applicability of King Broadcasting, or its continued validity in light of Kentucky River, are unpersuasive.

In addition, a producer is bound by the Employer's format and time allotments for news stories. Furthermore, the rundown is subject to change or revision by the news director and a reporter can go to the news director to discuss changing a rundown.

(c) Making work assignments

As noted above, the majority of reporter assignments are made at the editorial meetings. However, the record reveals that additional reporter assignments can be made by producers outside of these meetings (i.e. breaking news).

It is unclear from the record what authority the producer has to make such an assignment without first consulting or coordinating with the assignment editor. Moreover, specific concrete evidence was not introduced by the Employer establishing the use of independent judgment in making these assignment decisions, i.e. the precise factors that went into an actual decision made by an identified producer under clearly specified facts.

Regarding the assignment of particular stories to particular writers, the record is similarly without specific concrete evidence establishing the use of independent judgment in the making of these assignments. As for Producer Lewis, the only example she alluded to (a writer's familiarity with the story), evidences an assignment based on a routine or obvious factor.

(d) The direction of reporters and writers during the day

There is insufficient record evidence to conclude that the producers direct reporters and writers in the completion of their assignments throughout the day. In this regard, the record reveals that great deference is given to the reporters and writers to accomplish their tasks.

(e) Directing broadcasts

The record reveals that the participation and decisions made by a producer during the airing of a broadcast are of a routine nature, with the producer focused on keeping the newscast on track to finish in time.

Finally, the Employer has failed to establish that producers, in the performance of each of the alleged duties described above, "responsibly" directs employees. In this regard, the Employer did not introduce any specific concrete evidence (testimony, discipline warnings, evaluations) establishing that producers are or have been held accountable for the performance of reporters or writers.<sup>40</sup>

Based on the above, I find that the Employer has failed to meet its burden in establishing that the news or the sports producers assign and responsibly direct reporters and writers.

2. The authority to discipline

The Employer argues that producers have the authority to discipline writers and reporters over job performance issues.

However, the record only reveals that the Employer orally encourages the news department staff to meet with each other, one-on-one, to discuss problems before they come to him.

The record evidence does not establish that the Employer has a discipline system in place, whereby producers are specifically instructed or vested with the authority to discipline writers or reporters.

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<sup>40</sup> I also find the Employer's arguments about producers directing the news department during morning, evening, and weekend hours unpersuasive, since managers are available (via cellular phone) and the Employer's assigns a "manager-on-call" for the weekends.

Although the Employer may suggest or permit a producer to critique other staff members, the power to “point out and correct deficiencies” in the job performance of other employees does not establish the authority to discipline. Crittenton Hospital, supra, 328 NLRB at 879, citing Passavant Health Center, 284 NLRB 887, 889 (1987).

Based on the above, I find that the Employer has failed to meet its burden in establishing that the news or the sports producers have the authority to discipline writers or reporters.

3. The authority to set work hours

The producers do not set the schedules for any employees. Although the Employer alleges that producers have the authority to control employee work hours by calling them in, sending them home early, or authorizing overtime, the Employer failed to present specific concrete evidence<sup>41</sup> establishing that producers are in fact vested with this authority, or that employees are obligated to comply with any such request.<sup>42</sup>

Based on the above, I find that the Employer has failed to meet its burden in establishing that the news or the sports producers have the authority to control work hours.

4. The authority to effectively recommend

The Employer testified, generally, that the producers make effective recommendations regarding hiring, terminations, discipline, and evaluations.<sup>43</sup>

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<sup>41</sup> The Employer did not introduce any documentary evidence (time sheets, etc.)

<sup>42</sup> Furthermore, Stutz' testimony suggests this alleged authority has only occurred a few times. Under Board law, occasional isolated instances of actions which might otherwise be indicative of supervisory authority are generally insufficient to predicate a supervisory finding. Volair Contractors, 341 NLRB No. 98, slip opinion at page 3 (2004).

<sup>43</sup> Section 2(11) does not include ‘evaluate’ in its enumeration of supervisory functions, and is thus only evidence of “secondary indicia.”

Under Board law, the authority to recommend generally means that the recommended action is taken without independent investigation by superiors, and not simply that the recommendation is ultimately followed. Children's Farm House, 324 NLRB 61, 61 (1997).<sup>44</sup>

The record evidence merely suggests that on past occasions, the Employer has solicited input from producers regarding a particular applicant, or current employee, before the Employer made a personnel decision. The record does not establish, however, that the producers have independent authority to make these personnel decisions, or that the Employer has based personnel decisions on any alleged recommendations without the Employer conducting its own independent review of the matter.

Thus, I find that the Employer has failed to meet its burden of establishing that the news or the sports producers make effective recommendations relating to hiring, firing, discipline, or evaluations.

5. The "sweeps teams" and meetings with consultants

The Employer argues that supervisory status is further evidenced by the producers' participation in sweeps teams and/or by attending strategic planning meetings with consultants.

As an initial matter, the fact that an individual may attend management meetings is a secondary indicator of supervisory authority and does not in and of itself establish supervisory authority. Dean & Deluca New York, Inc., 338 NLRB 1046 (2003). Next, the record does not contain specific detailed facts regarding the producers' participation in the committees/meetings. Thus, it can not be concluded that, based on

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<sup>44</sup> Furthermore, the reporting on incidents of employee misconduct does not confer supervisory status if the reports do not contain disciplinary recommendations, and/or do not always lead to discipline. See generally Ten Broeck Commons, supra, 320 NLRB at 812.



this participation, the sports or news producers are supervisors within the meaning of the Act.

Based on the above, I find that the Employer has failed to meet its burden in establishing that the news or the sports producers' participation on "sweeps teams" or in attending meetings with consultants, establishes supervisory status.

#### **IV. CONCLUSION**

On the basis of the foregoing and the record as a whole, I find the petitioned-for unit, as amended at the hearing, appropriate. It is also concluded that the Employer has failed to establish that news producers or sports producers are supervisors within the meaning of Section 2(11) of the Act.<sup>45</sup>

Accordingly, they will be included in the appropriate unit, and I shall direct an election in the following appropriate unit (hereinafter "Unit"):

All full-time and regular part-time news department employees, including editors, photographers, news producers, sports producers, investigative producers/special project producers and writers employed by the Employer in and out of its facility located at 4600 Air Way, San Diego, California; excluding all other employees, office-clerical employees, guards and supervisors as defined in the Act

There are approximately 35 employees in the Unit found appropriate.

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<sup>45</sup>In its post-hearing brief, the Employer relies primarily on Hearst Broadcasting Corporation, d/b/a WDTN-TV, 267 NLRB 326 (1983); Westinghouse Broadcasting Company, Inc., 188 NLRB 157 (1971); and Westinghouse Broadcasting Company, Inc., 195 NLRB 339 (1972). However, I find those cases to be distinguishable. The producers found to be statutory supervisors in the above cases were vested with more independent authority, and did not function as part of an integrated production team like the producers in this case.

## **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations.

Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike that have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by the NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS-COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO.

## **LIST OF VOTERS**

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, two copies of an alphabetized election eligibility list, containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB 359 (1994).

In order to be timely filed, such list must be received in Region 21, 888 South Figueroa Street, 9th Floor, Los Angeles, California 90017, **on or before February 10, 2006**. No extension of time to file the list shall be granted, excepted in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (213)894-2778. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

## **NOTICE OF POSTING OBLIGATIONS**

According to Board Rules and Regulations, Section 103.21, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three (3) working days prior to the day of the election. Failure to follow the posting

requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least five (5) full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

### **RIGHT TO REQUEST REVIEW**

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. The Board in Washington must receive this request by **5 p.m., EST, on February 17, 2006**. This request may **not** be filed by facsimile.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file the above-described document electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web site:**www.nlr.gov**.

**DATED** at Los Angeles, California, this 3rd day February 2006.

/s/[Victoria E. Aguayo]  
Victoria E. Aguayo  
Regional Director, Region 21  
National Labor Relations Board

